STATE OF LOUISIANA.

Third District Court

No. 25,072.

STATE OF LOUISIANA ex Rel.
SOUTHERN BANK

vs.

E. PILSBURY, Mayor, et als.

COUNSEL ENGAGED IN THE CASE:

Messrs. JOHN A. CAMPBELL,
E. BERMUDEZ, } *For Relator.*

Messrs. H. N. OGDEN,
THOS. J. SEMMES,
JOHN FINNEY,
E. W. HUNTINGTON,
W. W. HOWE,
J. C. EGAN, } *For Intervenors.*

Messrs. B. F. JONAS,
H. C. MILLER, } *For Defendants.*

The following opinion was delivered by his Honor F. A. MONROE, Judge, on the 26th March, 1878.

The Relators, as the holders of some six hundred Bonds, known as the Consolidated Bonds of the City of New Orleans, pray that a writ of *mandamus* issue directing the Mayor and Administrators of said City to assess and, hereafter, collect and apply to the payment of said Bonds, principal and interest, as provided by Section 37, of Act 71 of 1852, and Act 72, supplemental thereto, a special tax of $650,000 for each of the years 1874, 1875, 1876, 1877, 1878, less the Coupons paid for 1874 and 1875 ; and that a writ of injunction issue, restraining these officers from levying any tax on the real estate subject to the special tax in favor of the consolidated loan debt under said Section 37, to the prejudice of said Consolidated Debt, and without first providing therefor.

The history of these Bonds and of the tax thus sought to be enforced is briefly as follows, as it appears from pleadings and evidence in this case :

The City of New Orleans was incorporated by the first Legislature which assembled under the government provided for the Territory of Orleans, in 1804-5, and the charter thus provided continued in force until 1836, when an act was passed dividing the City into three municipalities (Acts of 1836, p. 28)—each of which was created a separate and distinct corporation, with all the powers and liabilities incident

thereto, except such as were expressly reserved to what was called the General or City Council.

Provision was made in this act for the city debt existing at the time, which was placed under the control of a board to consist of the Mayor and six commissioners, composed of two members from each corporate council—the quota to be paid by each municipality being fixed upon the basis of the taxes and other revenue accruing to each.

By a supplemental act, approved a few days after the one first referred to, it was expressly provided (to quote the language): "That if the law, to which this is a supplement, should by any future legislature be repealed or so amended as to reunite the said three municipalities, created by said act, into one corporation, all the debts created by each of the said municipalities shall first be fully paid and satisfied by each municipality respectively," etc. This form of government endured until 1852, when the consolidation of the three municipalities was effected and their individuality destroyed by an act approved February 23, of that year.

The act in question was entitled "An act to consolidate the City of New Orleans, and to provide for the government and administration of its affairs." And it is upon Section 37 of this act that the Relators have founded their action. This Section reads as follows, to wit:

"Sec. 37. That the debt of the general sinking fund, commonly called the Old City Debt, and the

Debt of the three municipalities, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the City of New Orleans, and said City is hereby declared liable therefor. The Mayor, Controller and Treasurer, and the chairman of the finance committees of the boards of the Common Council shall constitute a commission to be called the Commissioners of the Consolidated Debt of New Orleans, and they shall have power to issue Bonds of the City of New Orleans, having not more than forty years to run, with interest, payable at such place as may be agreed on between said commissioners and the parties to whom the Bonds are issued, in semi-annual Coupons, in exchange for any Bonds, obligations or other debts of the old corporation, or of any of the municipalities, whether matured or not; or to sell the new Bonds and apply the proceeds to the payment of the matured debts of the old corporation, or of any of the municipalities, but to no other purpose. The Bonds thus issued shall form a stock to be called the Consolidated Debt of New Orleans. At the time this act goes into operation an exact and detailed statement of the indebtedness of the old corporation and of each municipality shall be filed in the office of the Controller by the Secretary of the board of liquidation and the municipal Controller respectively, when the commissioners of the consolidated debt shall proceed to divide the debt of the old corporation between the several munici-

palities, in proportion to the assessed value of real estate within the limits of each, according to the State assessment roll of 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this act goes into operation, shall constitute the separate debt of each municipality, and shall be known as the debt of Municipality No. 1, No. 2, No. 3. The Common Council shall annually, in the month of January, pass an ordinance to raise the sum of $600,000 by a special tax on real estate and slaves, to be called the consolidated loan tax: and the rate per cent of said tax in each municipality shall be in proportion to the indebtedness of each. All ordinances, resolutions or other acts passed by said Council after the first day of January in each year shall be null and void, unless the ordinance imposing the consolidated loan tax shall have been previously passed; at the end of each and every year any surplus of the consolidated loan tax remaining in the treasury after the payment of all the interest and expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such Bonds issued under this act as have the shortest period to run; and the Common Council shall have the right of rejecting all bids demanding more than the face of the Bonds: for which purpose public notice shall be given by the Controller in the official gazette for thirty days, inviting proposals from Bondholders for the sale to the City of the Bonds herein described. From and after the passage of this act,

no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the City of New Orleans, or under its authority ; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said City, which shall be taken in the manner prescribed by the City Council, after ten days' proclamation by the Mayor in the newspaper chosen by the Common Council ; and no ordinance creating a debt or loan shall be valid unless for some single object or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which such debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or debt incurred ; and such ordinance shall not be repealed until principal and interest of the capital borrowed or debt incurred are fully paid and discharged."

By act No. 72 of the same year, the City of Lafayette was added to the City of New Orleans, the City of New Orleans assumed its debt, and an additional $50,000 per annum was required to be raised, thus making the total annual levy $650,000.

The Relator as a free Bank, was compelled by law to invest in the Bonds issued in pursuance of the foregoing Section, to secure its circulation, and, as it appears, owns over six hundred of them.

No complaint is made of the manner in which the

provisions of the Section quoted were complied with until 1874, when an act was passed, entitled "An act to postpone the levy and collection by the City of New Orleans of a tax for sinking fund for the purchase of its Bonds; to authorize the administrators to modify the last budget and tax levy, and to repeal conflicting laws and penalties."

This act was No. 53 of 1874, and its object was to relieve the City of New Orleans until December, 1876, from levying or collecting any tax for a sinking fund for the purchase of Bonds issued under Section thirty-seven of the Act of 1852.

By Act No. 31, of 1876, however, entitled "An act to adjust, regulate and provide for the bonded debt of the City of New Orleans," etc., the issue of certain other bonds, known as Premium Bonds, was authorized and it was provided as follows, to wit:

"Sec. 7. *Be it further enacted, etc.,* That no tax for the payment of Bonds or interest on Bonds other than that authorized by the preceding Sections shall be levied either for the year 1876, or any year or years thereafter, by the City of New Orleans, and that all existing laws requiring or authorizing the City Council to levy any tax whatsoever for Bonds or interests on Bonds, other than said Premium Bonds be and are hereby repealed; and it shall be hereafter incompetent for any Court to *mandamus* the officers of said City to levy and collect any interest tax other than that provided by this act, or in case of such *mandamus*, by a receiver or otherwise, to direct the levy and collection of any such tax.

Considering the two acts last quoted, and other matters set up, the City of New Orleans has since 1874 failed to provide for the sinking fund, and since 1876 has failed to provide in any way for the Consolidated Debt, hence this litigation.

For exception and answer to the petition the Mayor and Administrators of the City of New Orleans say :

First—That this Court is without jurisdiction to issue the writs prayed for, for this, to wit :

That by the provisions of Act No. 5 of 1870, and of Act No. 31 of 1876, the Courts of this State are prohibited from issuing any writ of *mandamus* to compel Respondents to pay any debt not liquidated by judgment or to compel them to levy and collect any interest tax other than that provided for in said Act No. 31 of 1876.

Respondents further plead the provisions of said Acts 31 of 1876, and 53 of 1874, which have been quoted, and they aver, moreover, that the Act 71, of 1852, under which Relators claim, (and especially Section 37) is null and void for this, to wit :

That said act is violative of article 118 of the constitution of 1845, which requires that no law shall embrace but one object, which shall be expressed in the title.

That it is violative of articles 127 of said constitution of 1845, and 123 of the constitution of 1852, requiring taxation to be equal and uniform.

In addition to the Relators and Respondents,

certain other persons have appeared in this suit by way of interventions, which are substantially as follows:

John J. Weckerling and others, claiming to be the owners of real estate in the First, Fourth and Sixth Districts of this city, which will be affected by the tax sought to be imposed, set up that interest, and pray that Relators' petition be dismissed.

Thomas H. Hunt, claiming to be the owner of some of the Bonds issued under and by virtue of Act No. 31, 1876, also joins the Respondents in the prayer that Relators' petition be dismissed.

The State of Louisiana, claiming an interest in Consolidated City Bonds, joins in the prayer of the Relator for the writs of *mandamus* and injunction.

H. W. Montgomery, John R. Clay and others, set up an interest as owners of real estate, which will be affected by the tax, and join Relators to the extent of asking the levy of the tax for the years beginning with 1878, and thereafter, but deprecate any attempt to collect such tax for past years.

The applications of Messrs. Weckerling and Hunt for permission to intervene having been made in open Court, counsel for Relators objected upon the grounds:

1. That interventions could not be allowed in *mandamus* proceedings such as that before the Court.

2. That no intervention can be allowed unless the party shows a direct interest, which would be irrepa-

rably injured by the result, and unless such party could bring a direct suit to recover the object of the intervention.

These objections having been overruled, a bill of exceptions was taken.

Objection was also made to the filing by the Respondents of a supplemental and amended return, and a bill of exceptions was reserved to similar ruling of the Court.

Subsequently counsel for Relators filed a motion to strike out the returns made by Respondents upon the grounds:

1. Because they embrace irrelevent and scandalous matter relative to the procurement of the passage of Act No. 53 of 1874.

2. Because Respondents, as ministerial officers, have no interest and no right to assail the constitutionality of the Act of 1852, such objections being appropriate only to those from whom the tax, when levied, may be sought to be collected.

3. Because said returns set up prohibitory acts which either have no application or are in violation of the constitution of the United States.

4. That Respondents are estopped from denying the validity of the Bonds held by Relators by reason of the fact that such validity has been formally recognized by legislative enactments and by a final judgment in the case of Maenhaut vs. New Orleans, No. 7423 of the docket of the United States Circuit Court for this district, which is invoked as *res judicata*.

5. Because the said returns are inconsistent and self-destructive, in this: that they admit the levy and collection of the tax in question under Section 37 of the Act of 1852, and yet set up the unconstitutionality of said Act.

6. Because the charter of the City recognizes the validity of said Consolidated Debt.

It was further moved to strike out the intervention of those parties who joined the Respondents, upon the grounds which have been mentioned as grounds of objection to the filing of said interventions, and on the additional grounds:

That said intervenors cannot urge other defenses than those set up by Respondents.

That said intervenors have no authority to represent the City of New Orleans, and are estopped from assailing the constitutionality of the acts relied on by Relator, for the reason that the validity of the same has been recognized by the State and by judgments as already stated.

Considering this motion, first, in so far as it relates to the returns filed by Respondents: if the position of Relator's counsel be correct, that the Mayor and Administrators of the City of New Orleans have no interest, and therefore no right to urge the defenses set up in their return, that no citizen of New Orleans can intervene as a tax payer to resist the demand made, until the tax in question is actually sought to be collected, and that no holder of Premium Bonds, the tax for the payment of the interest on which is

sought to be enjoined, can intervene, as not having a direct interest, the question arises, who, if any one, can defend this action?

It is argued that the intervenors have no title to appear, for the reason that the City corporation represents all the members of the corporation. It is evident then that the City corporation is the party defendant before the Court, and that these proceedings are directed against the Mayor and Administrators not merely in their ministerial but in their representative capacity.

The prayer of the petition is, that the said Mayor and Administrators be directed to levy and collect a certain tax; that they be enjoined from levying other taxes; that the City of New Orleans and said Mayor be notified of these proceedings; that the right of Relators to personal process and to damages against said officers on their official bonds be reserved, as also their right to a writ of distringas against their revenues and the revenues of the City of New Orleans.

The Respondents are therefore not before the Court merely as executive officers without interest in the result, but as constituting the corporation of the City of New Orleans, whose revenues are the subject of the controversy. The plea of *res judicata* set up by the Relators is an admission of this fact, since the suits of "Maenhaut" and "Montgomery", relied on, are both of them suits in which the City, and not the individuals or officers named as Mayor and

Administrators, was the party defendant. It is the City of New Orleans, brought before the Court by the act of the Relators, who opposes their demand, and who, being the party in interest, is entitled to set up any defense against which there is no estoppel.

A case has been referred to (27 A. 430), where it was held, upon an application for a *mandamus* against the State Auditor, that he had no interest in assailing the constitutionality of the laws under which the application was made. It does not appear, however, that the State was made a party to that proceeding; and, whilst the Auditor may have been without authority to set up such a defense in behalf of the State, it by no means follows that the defense could not have been urged by the State if made a party to the suit.

The same thing may be said of the case cited from 11 A. 672, where the defendant in the *mandamus* proceeding was the Sheriff. The Court said: "The right of this executive officer to raise these constitutional objections is by no means clear," etc. The Sheriff in that case represented neither the parish of Avoyelles nor the citizens of that parish; his duties were defined by law, and did not include the obligation to represent any one concerned in that suit in judicial proceedings.

So far as concerns the conflict between the Act of 1852 under which the Relators claim, and the subsequent Acts and more particularly Act No. 53 of 1874 and Act No. 31 of 1876, unless it be conceded

that the Mayor and Administrators are vested with judicial powers, and have the right to decide upon the constitutionality of statutes duly enacted by the Legislature, it would seem to be their plain duty to submit such questions to some competent authority for determination ; and in case of non-interference by those interested, or in case no such determination as that indicated is reached, it is proper that they should be governed by the latest expression of legislative will. Where, as in this case, the propriety of their action is called in question, it is not only their right but their duty, and this whether they appear in a representative or in a ministerial capacity, to exhibit to the Court the authority or the prohibition under which they act or refuse to act.

It is claimed, however, that Respondents are estopped from denying the validity of the Bonds held by the Relators.

First—By the formal recognition of the validity of said Bonds by legislative enactments.

Second—By the judgments rendered in the cases of Maenhaut, and of Montgomery vs. the City of New Orleans, by the Circuit Court of the United States for this district, which are pleaded as *res judicata*.

This plea of estoppel is neither more nor less than a peremptory exception founded on law, and may be so treated. The remedy of striking out pleadings, unless obviously scandalous, impertinent or irrelevent, is not favored under our practice, and, for

reasons just assigned, is refused as to the returns made by the Defendants.

The motion to strike out, as has been stated, includes the interventions of those who join with the Defendants in their defense and prayer: and as to the intervenors, the additional ground is suggested that they have no direct and immediate interest in the result of this proceeding, and, furthermore, that interventions are not permissible in *mandamus* proceedings.

Upon this subject, under the Code of Practice, the right to intervene is governed by the interest of the party, and not by the character of the proceeding. It is expressly provided that the intervention shall not retard the principal suit; and although delays have been allowed to intervenors in some instances, it is not to be presumed that the Courts will permit an abuse of the privilege. Certainly no such cause of complaint has been given in this case. The question then is whether the intervenors have shown the interest contemplated by law.

It will be remembered that the intervention of Messrs. John J. Weckerling, Jesse K. Bell and others is based upon their ownership of real estate which may be subjected to the tax for the imposition of which this proceeding has been instituted.

As was said in the case of "Roudanez vs. the Mayor," etc., 29 A. p. 273:

"If the City of New Orleans should, by vote or otherwise, seek to extort from the plaintiff illegal or

unconstitutional taxes, whether to pay for election or other purposes, they will have ample opportunity to protect themselves through the Courts. But "sufficient unto the day is the evil thereof."

So it may be said in this case. For the purposes of this writ the City corporation represents all the members of the corporation ; it was for that purpose that the corporation was created, and it is for that purpose that it is before the Court. As to the intervention of Weckerling and others, the motion to strike out must therefore prevail.

The intervention of Thomas H. Hunt, against which the motion is also directed, is based upon different grounds. He appears as the holder of certain Bonds issued under and by virtue of Act No. 31 of 1876 ; not as a member of the corporation defendant, but, like the Relators, as a creditor of that coporation, whose claims conflict with that of the Relators. The immediate effect of the judgment prayed for may be to inhibit the collection of the tax provided for the payment of the principal and interest of his Bonds in the event that the collection of such tax is prejudicial to the Relators' claim. He has, therefore, manifestly an immediate and direct interest in defeating that result. The motion as to this intervention must therefore be overruled.

Reverting to the question of estoppel as set up against the Respondents, in the motion to strike out so much of the return as attacks the validity of the Bonds held by Relators, and in the plea of *res judicata*,

it may be remarked that no serious attack has been made upon the validity of the Bonds—in fact, it was substantially admitted in the argument of the case that they are valid obligations of the City, nor have any of the arguments adduced for the purpose of defeating the methods here resorted to of enforcing the payment of said Bonds been based upon their supposed invalidity. It is true that the return made by the Respondents sets up the unconstitutionality of the Act of 1852 upon specific grounds, and concludes with the averment that "all acts or parts of acts passed since 1852, and which Relators allege recognize the Bonds and tax specified in said thirty-seventh Section of said Act of 1852, in so far as said recognition is concerned (if such was their purpose), are upon the same grounds wholly unconstitutional, null and void.

It seems that since 1852 fourteen Acts have been passed by the Legislature, in which these Bonds have been referred to or recognized distinctly as valid obligations of the City of New Orleans. These acts include the various charters of the City down to the present one, under which it lives and moves and has its being, and also includes Act No. 53 of 1874, the provisions of which are set up by Respondents as a defense to this proceeding. In that act the following language is used :

"And provided further, That the validity of the Consolidated Bonds of the City of New Orleans is hereby recognized in all its integrity, it being the

object of this act to afford temporary relief to the tax payers of New Orleans in the embarrassed condition of affairs, and not to detract from or impair the rights of the holders of said Bonds or others."

The Court does not understand the Counsel for the Respondents as using this act as a defense and at the same time attacking its constitutionality. Nor does the Court understand the Respondents as attacking their own corporate existence, and yet the charter of the City of New Orleans recognizes the validity of the Consolidated Bonds in terms almost as distinct as those above quoted.

Beyond this, it is averred by the Respondents that "tax to pay the interest on said Consolidated Bonds was regularly assessed and collected until the year 1876, when it was prohibited by the provisions of said Act No. 31 of 1876."

Such an averment of acquiescence during a period of twenty-five years, may well be regarded as estopping a denial, at this time, of the validity of these Bonds.

See Bigelow on Estoppel 582, 28 Ark., 558.

Referring to the cases in which judgments are required, establishing the validity of the debt as a preliminary to the issuance of the writ of *mandamus*, we find in Burroughs on taxation, p. 451 (§ 144), the following:

"If the debt be an ordinary debt, one as to which there is no special provision made by law, it must be first reduced to a judgment by an action at law," etc. And further on, at page 453, he continues:

"There is an exception to the rule that judgment must be first obtained before an application for a *mandamus* will be entertained. It is in that class of cases where, by the statutes creating the debt, as in the case in Bonds in aid of railroads, it is made the duty of certain officers to levy a tax for the purpose of paying such Bonds. Here there is a clear legal duty upon the officers to make the levy, and there is no other remedy for a failure to perform such duty but a *mandamus*, and there is no necessity for a judgment to ascertain the amount due."

The author goes on to say that when a doubt is suggested as to the validity of the Bonds, the party will be required to establish his claim by judgment.

As has already been indicated, the Court is of opinion that a reasonable construction of the pleadings in this case, taken in connection with the able and exhaustive arguments, both oral and written, which have been submitted, does not justify the conclusion that the doubt suggested by the answer of the Defendants was intended to go beyond the question of the validity of the tax and the method of its enforcement, and does not affect the validity of the Bonds.

It is urged, however, that the decisions in the cases of "Maenhaut," and of "Montgomery vs. the City of New Orleans," decided by the Circuit Court of the United States, are conclusive against Respondents, not only as to the validity of the Bonds, but as to the validity of the tax here claimed.

The first of these points it is unnecessary further to consider.

The question decided in the case of "Maenhaut" was that an injunction would lie upon the application of bondholders to restrain the City from misappropriating a fund collected and in bank to the credit of the Consolidated Bonds. That fund was certainly not collected under the Act of 1852, nor was it necessary for the purposes of that proceeding that it should have been. It was sufficient that it was imposed by law, and collected and held in trust for the parties who claimed it. It was, however, collected upon a very different basis of assessment from that provided by the Act of 1852, and whether the particular method of collection provided by that act could have been enforced was not before the Court, and formed no part of the decree.

The suit of Montgomery was an ordinary one upon unpaid coupons, to which, as far as the Court is informed, the Relators were not parties. The method of enforcing the judgment obtained by Mr. Montgomery was not discussed, his rights, whatever they may be, under the Act of 1852 were reserved to him. The case has, therefore, no element of *res judicata*, as against the defense here set up, other than the cause of action—and it may be doubted whether even this was identical with that on which this suit is based, since the coupons are not the same as those held by the Relators.

These preliminary questions having been thus

disposed of, the case may be considered upon its merits.

The claim of the Relators is to enforce by *mandamus* the provisions of the thirty-seventh Section of Act No. 71, of 1852, in so far as to compel the proper officers of the City of New Orleans to levy a tax for the payment of the principal and interest of their Bonds in the manner provided by that Section, and further to enjoin the imposition and collection of any other tax to the prejudice of that, the collection of which they seek to enforce.

It is objected that the provisions relied on are unconstitutional, because the objects of the act are not expressed in the title, and because the tax provided for is not equal and uniform.

First—The title of the act in question reads as follows :

" An act to consolidate the City of New Orleans, and to provide for the government and administration of its affairs."

It has been already stated that in 1836 the City of New Orleans was divided into three municipalities ; for many purposes totally distinct, and yet, to some extent, held together by a common bond. The title of this act was :

" An act to amend the act entitled An act to incorporate the City of New Orleans," etc. The existence of the City of New Orleans was not totally destroyed, but the form of government was changed. The three municipalities into which it was divided

were characterized as "Municipalities of the City of New Orleans," (See Section 8.) and provision was made for a common Mayor, having the same power, in each of the municipalities, as he then possessed in the entire City, with such exceptions as were expressly provided. (Section 2.) Each municipality, however, had the power to contract debts, and they availed themselves of the privilege, so that when they were consolidated again in 1852, they seem to have been considerably involved.

The question then is, does not the title of the act under which this consolidation was effected sufficiently convey the idea of its object so far as these debts were concerned.

Cooley in his work on Constitutional Limitations, p. 143, says, in regard to provisions such as that relied on :

"It may, therefore, be assumed as settled that the purpose of these provisions was : First, to prevent hodge-podge or "log-rolling" legislation ; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted ; and, third, to fairly apprise the people through such publications of legislative proceedings, as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

The provisions of Section 37 of the Act of 1852 are certainly not obnoxious to the constitutional provision for any of the reasons above stated. It can not be called *hodge-podge* or "log-rolling" legislation, and it is strictly germain to the administration of the affairs of the City of New Orleans to which the title of the bill related. The status of the City was fixed by legislative enactment, and the Legislature and the people must be supposed to have known the laws by which they were governed. It could have been no secret to them that the City of New Orleans had been divided, sixteen years before, into three municipalities, and that those municipalities had contracted debts which must be discharged; when, therefore, an act was passed providing for the consolidation of the City, and for the government and administration of its affairs, it is difficult to perceive how any one could be taken by surprise that such an act should contain provisions concerning the obligations of the City and of its divisions, thus consolidated. No more important affairs than the settlement of these obligations were to be administered. In fact, if we consult the legislation and jurisprudence of the day, it would seem that the condition of these particular affairs provoked the passage of the act.

The "consolidation" of the City certainly conveyed the idea of the obliteration of the distinct divisions of which it was composed, and the individual must have been dull of comprehension indeed, to

whom the idea would not have been conveyed, even by this one word, that some disposition was to be madə of the rights and obligations of the corporations thus disposed of. If any doubt could have been left, however, it must have been removed by the additional words "to provide for the government and administration of its affairs"; for, as has already been remarked, the debts of the City and of the municipalities were matters of legislative and judicial history, and constituted the "affairs," which, more than anything else, required "administration." If, therefore, the act had contained no provision on this subject, it might well have been said that the title was deceptive and calculated to mislead, for certainly such were to have been expected.

Numerous authorities have been cited upon this point by the counsel upon either side. The Court will be content with a reference to one of them. In the case of Municipality vs. Michaud, 6 A. 805, the Supreme Court of the State held that it is sufficient, under the constitution, if the object of the act is stated in the title according to the understanding of "reasonable men."

Second—As to the equality and uniformity of the tax imposed by the Act of 1852, the language of the law is that, "The Common Council shall, annually, in the month of January, pass an ordinance to raise the sum of $600,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and the ratio per cent of said tax in each municipality

shall be in proportion to the indebtedness of each."

[This amount was increased to $650,000 by section eight of Act No. 72 of the same year, by which the City of Lafayette was annexed.]

"At the end of each and every year any surplus of the consolidated loan tax remaining in the treasury, after the payment of the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such Bonds issued under this Act as have the shortest period to run."

This law was approved February 25, 1852. The constitution of 1852 was adopted on the 31st of July of that year. The law was therefore under the dominion of the pre-existing constitution of 1845. Act 127 of that constitution provides that: "Taxation shall be equal and uniform throughout the State. After the year 1848, all property on which taxes may be levied, in this State, shall be taxed in proportion to its value, to be ascertained as directed by law No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied. * * *"

The Respondents claim that the tax upon real estate and slaves alone, and the system upon which the tax was imposed upon the different municipalities, was obnoxious to this article of the constitution.

This article of the constitution was first presented to the Supreme Court of the State for interpretation, in 1847, in the case of the Second Municipality of New Orleans vs. Duncan, 2 A. 182.

This was a suit to collect a tax imposed, under an ordinance of the municipality, on all real estate within its limits.

The report of the case embodies a synopsis of the Defendant's argument, in which the points are made :

1. That under the constitution, articles 32 and 127, the power of taxation was vested exclusively in the Legislature ; and

2. (To quote). "Supposing that the municipality enjoyed the unquestionable right to levy taxes for the purpose mentioned in the preamble of the ordinance, yet it is null and void. All taxation must be fair and equal '*so that no one class of individuals and no one species of property may be unduly assessed*,' to use the language of Chancellor Kent, 2 Com. 23."

The decision was rendered by Chief Justice Eustis, who said :

"The objects of the imposition of this tax are within the lawful powers of the municipality and proper subjects of administration. The tax itself is said to be unconstitutional, it being in conflict with article 127 of the constitution of 1845. The article by its very terms applies to State, and not to municipal taxes. It provides for equality and uniformity of taxation *throughout the State*. As an approximation to either of these objects would be impossible without a general valuation of the property to be taxed, the article provides for the postponement of its operation until after the year 1848, thus giving time

for the Legislature to carry into effect a principle which has hitherto been a standing monument of the impotency of civil government, in applying to the complicated facts of society, abstractions, however true, just and important they may be. As we have had occasion to observe recently, in the case of Egerton vs. the Third Municipality, 1 A. R. 435, the framers of the constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants, and their corporate existence is recognized and continued, as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them and the power of remedying the evils of misgovernment was left in *statu quo*, with the Legislature ; and the convention confined itself to providing for the State government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control."

Continuing at page 185, the learned judge says :

"We have no means before us by which we can form an idea of the equality of the taxation by this municipality, in its practical results. We are furnished with no evidence of the mode in which the public burdens operate upon the inhabitants. We have a simple admission, made in the record, "that there is no other special ordinance of the Second Municipality assessing taxes on personal property." We know of no reason imperative on the municipality

to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

Referring to the power of the Court to control the arbitrary exercise of the right of taxation, and in view of the inapplicability to the municipality of the article 127 of the constitution, the judge said:

"In conclusion, it may not be out of place to state that, as the guardians of the rights and property of citizens, we should fail in our duty if we were to forbear to exercise our power on any proper occasion to protect them from spoliation: at the same time it must be confined to its constitutional limits, and to those cases in which its authority cannot be questioned, and its action will consequently be effectual."

This decision was followed by the decision in the case of Lafayette vs. Cummins, 3 A. 673, decided in December, 1848, where the question involved a sum claimed from the Defendant on account of his trade as a butcher.

In this decision no distinction is made by the Court on account of the sum claimed being for a license; but the decision in Duncan's case (just cited) was distinctly affirmed, both as to the application of Article 127 to State taxes alone, and as to the right of the corporation to impose a particular tax upon one class of property and not upon another.

In the case of Buffington vs. Dinkgrave, 4 A. 548, the decisions just quoted were referred to as sufficient authority for the dismissal of a claim that a peddler's license was obnoxious to Art. 127 of the constitution.

In the case of Bordelon vs. Lewis, 8 A. 472, the defendants were sued by the school directors of the parish of St. Landry for a special school tax, and the decision in Duncan's case was again quoted with approval.

In the case of the State vs. the heirs of Poydras, 9 An. 165, it was held that the tax of 10 per cent upon property failing to aliens and non-resident citizens was constitutional. The Court, after quoting Article 127 of the constitution, said :

" To be equal and uniform, taxation need not be universal. Certain objects may be made its subjects and others may be exempted from its operation ; certain occupations may be taxed and others not ; so, some occupations may be taxed for a greater amount and others for a less, but as between the subjects of taxation in the same class there must be an equality." The decisions in Second and Third Annuals, already referred to, were again quoted with approval.

It will thus be seen that from 1847, when the question was first presented for decision, down to the case of the State vs. the heirs of Poydras, decided in March, 1854, it was uniformly held that taxation, to be uniform, need not be universal, but that the equality required by the constitution extended only to the particular class of property taxed. The

decision in the case of Duncan was repeatedly quoted with approval, and was certainly entitled to the highest consideration, especially upon the questions involving the interpretation of the constitution of 1845, not only because of the great learning and ability of the Court, but because the decision was rendered within two years after that constitution was adopted, by jurists, who were necessarily familiar with its history, as a contemporaneous act. Nay, more than this. In the dissenting opinion of Judge Slidell in the Benton street case, 9 A. 454, he says of that Court :

" I may add, as not inappropriate to the subject of constitutional interpretation, that three of the judges who occupied seats in the Court which has recently gone out of existence were members of the convention of 1845 among them the late Chief Justice, who was a prominent member of the Judiciary Committee in that convention, and whose recent retirement from the bench I deem a public loss."

The case in which the dissenting opinion thus quoted was rendered, arose out of an attempt to enforce the collection of what, in more modern jurisprudence, is known as a "local assessment." In other words, it was a charge or contribution levied upon the contiguous properties by Municipality No. 2 for the opening of Benton street.

It was held by the Court, Mr. Justice Ogden rendering the decision, that the charge or assessment in question was a tax within the meaning of the constitutional prohibitions.

The learned judge said : Both the exercise of the right of eminent domain and the power of taxation are limited under our constitution, and the rule with us is deduced, not from general principles, but from the constitution itself ; that there does not exist either in the Legislature or in any sub-divisions of State sovereignty a power of apportioning taxation for public purposes, whether of a general or of a local character, except on the principle of equality and uniformity." * * * * * * * * * * * *

From this decision Chief Justice Slidell and Mr. Justice Campbell dissented ; the opinion was, therefore, rendered by a bare majority of the Court, consisting of Justices Ogden, Buchanan and Voorhies. (See Municipality vs. White, 9 A. 454.)

A somewhat similar case, also decided by Judge Ogden, is to be found in the same volume. (Cummings vs. Police Jury. 9 A. 503.) This was an injunction suit to prevent the collection of a special tax levied by the Police Jury of Rapides for levee purposes. The Court held that it was violative of Article 123 of the constitution of 1852 (then in force), which is identical with Article 127 of the constitution of 1845.

In the case of Yeatman vs. Crandell, 11 A. 220, plaintiff enjoined the collection of a special tax imposed by the Legislature for levee purposes upon alluvial lands in the parishes of Carroll, Madison and Catahoula. It will be seen, therefore, that this case differed from the one last quoted only in this : that

the tax in the one case was imposed by the Police Jury, and in the other by the Legislature.

The Court, however, (Mr. Justice Spofford rendering the decision) said, in referring to the constitutional provisions under consideration: "This article refers to State taxation in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform throughout the State, it points directly to its object, which is to regulate the mode of filling the State treasury. * *

"An assessment for levee purposes is not a tax in the strict legal sense of the term, although it is true the Legislature has called it so in the act whose constitutionality is attacked.

"But a principle of equity which exists independent of any constitutional recognition would dictate that the assessment should be made upon the land of each proprietor, as nearly as practicable in proportion to the benefit received.

"To secure an exact equality, in this as in everything else dependent upon human government, is impossible. Perfection in legislation is the dream of visionary minds."

The tax was accordingly sustained, Judge Voorhies, in a concurring opinion, saying:

"I have been led to reconsider the opinion to which I assented in the Benton street case, and in the case of Cummings vs. the Police Jury of the parish of Rapides." The ground of this reconsideration being that he did not consider the provision of

the constitution applicable to municipal or local taxation for local improvements.

The same views were held by the Court in the cases of Surgi vs. Snetchman and Surgi vs. Batalora, 11 A. 387, being suits for local assessments for paving. Also in the case of Jamison vs. New Orleans, 12 A. 346.

In the case of Mrs. Layton vs. New Orleans, 12 A. 515, the plaintiff, a resident of the former City of Lafayette, complained of the act of March 12, 1856, by which it was made unlawful for the City Council to levy any tax whatever, whether on real estate or slaves or movables, except the same be equal and uniform within the entire limits of the City. The *gravamen* of the plaintiff's petition was, that by the Act of 1852 the City of Lafayette was to be taxed for only $50,000. The Court, however, held that *quoad* the City of Lafayette, the Legislature could impose the tax as it deemed proper. What might have been the conclusion, had the objection been made by the City of New Orleans or by the bondholders, does not appear.

In the case of Wallace vs. Shelton, 14 A. 503, being an injunction against a tax for levee purposes, the Court said, in referring to the case just cited :

" In the case of Layton vs. City of New Orleans, 12 A. 515, we said that nothing prevented the Legislature from adopting different principles as the basis of its legislation. When the different municipalities were consolidated into one City, the Legislature

adopted the principle that each municipality had the right to pay its own debts. Subsequently the Legislature adopted the principle that it was equal and just that the City at large should pay the very unequal debts of the different municipalities. *It was not in the power of this Court to say that the legislation was unconstitutional.*

From this somewhat lengthy résumé of the jurisprudence of the State upon the subject under consideration, embracing a period of some twelve years—from 1847, when the decision was rendered in the case of Duncan, by a Court, of which three members appear to have sat in the convention by which the constitution interpreted by them was adopted, down to 1859, when the decision just cited was rendered—it appears that, with the exception of the two cases decided by Judge Ogden (reported in 9 A.) which were soon after overruled, it was uniformly held :

That taxation, to be equal and uniform, need not be universal.

That the Legislature was not prevented by the constitutions of 1845 and 1852 from dividing the objects of taxation into classes (on this point a decision is reported in 10 A., p. 298, State vs. Lathrop), provided the burden was imposed equally upon all those in the same class ; and, to use the language of the Court in the case of Yeatman vs. Crandell :

That " the article (127 of the constitution of 1845) refers to State taxation in its proper sense, for general or State purposes. When it says that taxation

shall be equal and uniform throughout the State it points directly to its object, which is to regulate the mode of filling the State treasury."

It has been argued that the opinion rendered by Chief Justice Eustis in Duncan's case, to the effect that article 127 of the constitution of 1845 did not apply to municipal taxation, is to be regarded as an *obiter dictum*, inasmuch as by its terms that article was not to go into effect until after the year 1848, and could, therefore, have had no bearing on the case decided.

Assuming this view of the subject to be correct, the same objection cannot be urged to the decisions in the cases of Buffington vs. Dinkgrave, (4 An., 548), decided in 1849 : Gillespie vs. Police Jury, decided in 1850, (5 An., 403); Bordelon vs. Lewis, decided in 1853, (8 An., 472); State vs. Poydras, decided in 1854, (9 An., 165), or to that above quoted in Yeatman vs. Crandell, (11 An., 220.) If it be true, as stated in the decision last mentioned, that the object of article 127 of the constitution of 1845 was "*to regulate the mode of filling the State Treasury*," it certainly can have no application to the question now before this Court. The tax imposed under the Act of 1852 was as surely a tax imposed for a local purpose as an assessment for constructing a levee or laying a banquette. It was a tax imposed upon a class of property owned by particular individuals for the purpose of paying a debt which they had contracted. The State at large had nothing to

do with contracting the debt or with the collection of the tax for its payment, so far as the constitutional provision in question is concerned.

For the purposes of this case it is unnecessary to consider what changes have taken place in the jurisprudence of the State since the rendition of the decisions to which reference has been made. They embrace the period during which the Bonds in question were issued and negotiated, and must be regarded as authoritative and conclusive upon the parties by whom said Bonds were issued and received. This principle was laid down in the case of "Gelpeke," 1 Wallace, 206, in which the Supreme Court of the United States held :

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true view is that if the contract, when made, was valid by the laws of the State, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the Legislature or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact a law. To this rule thus enlarged we adhere. It is the law of the Court. It rests upon the plainest principle of justice. To hold otherwise would be as unfair as to hold that rights acquired under a statute may be lost by its repeal."

See also 5 Wallace, 294 ; 16 How., 432 ; 3 Wall., 327 ; 7 Wall., 181 ; 9 Wall., 477 ; 2 Otto, 633 ; Cooley on Constitutional Limitations, p. 68.

Considering the question as to the basis of taxation fixed by the Act of 1852, it is clear that if the article of the constitution relied on did not apply, the Courts could interfere only upon general principles and for the purpose of protecting the public from spoliation. This case certainly presents no such cause for interference. It was so held in the case of Wallace vs. Shelton, 14 A. 503.

The Court therefore concludes that the objection urged to the constitutionality of the Act of 1852 cannot affect the questions involved in this proceeding.

It remains then to be determined what are the rights of the parties under that Act.

It is claimed that the thirty-seventh section of the Act of 1852 constitutes a contract between the City of New Orleans and the holders of the Bonds issued under and by virtue of that section, which the Legislature had no power to impair, and that the subsequent legislation upon the same subject matter is inoperative for that purpose.

The Court has been referred to a vast number of authorities upon this subject, and has carefully considered those within its reach, including all to which especial importance has been attached.

There can be no question either as to the weight of authority or reason. As was said by the Supreme

Court of the United States in the case of Van Hoffman vs. the City of Quincy, 4 Wall. 554: "It is well settled that a State may disable itself by contract from exercising its taxing powers in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute: and neither the State nor the corporation can any more impair the obligation of the contract in this way than any other."

It will be observed that this decision was rendered in 1866 by Mr. Justice Swayne, as the organ of the Court: by whom also the case of Gilman vs. the City of Sheboygan (2 Black 510) was decided in 1862.

It is difficult to perceive how the decision last referred to affects the question now before this Court.

The City of Sheboygan had issued bonds under a law authorizing the imposition of a tax on real and personal property alike for their payment. Subsequently, a statute was passed limiting the power of taxation for such purpose to real estate alone. Gilman, the Plaintiff, as an owner of real estate, enjoined the collection of this tax. The decision

was, in effect, that there was no contract between the State and Gilman. The Court expressly said:

"We hear of no complaint from the bondholders. It does not belong to the complainant, vicariously, to enforce their contract and protect their rights."

This language imports a clear recognition of an existing contract between the State and the bondholders, which is all that is contended for in the case at bar. The same thing, in substance, was decided in the case of Layton vs. New Orleans. 12 A. 515.

For further authority on this point the Court has been referred to: Cooley on Constitutional Lim., p. 285; Burroughs on Taxation, 427; Sedgwick on Constitutional Law, p. 619; 1 Dillon on Municipal Corporations, sec. 41; 45 N. Y., 234; 25 Cal., 638; 4 Wheat, 419, and other authorities too numerous to mention.

It is claimed, however, that for the system of taxation provided by the Act of 1852 another system was substituted by subsequent Acts, and that the Act of 1852 is therefore repealed or obsolete.

It is true that from 1856 the tax imposed by the City for the payment of the consolidated debt was assessed upon a different basis from that provided by the Act of 1852, but it is claimed that the collection of the taxes provided for by the laws passed since 1852 is prohibited by Act No. 31 of 1876, that the Relators cannot enforce the provisions of the Act of 1852 because it has been superseded or repealed by those of 1856, providing for general taxation, and

that the Acts providing this general taxation cannot be enforced because they form no part of the Relator's contract. The answer to this proposition is that so long as the debt due to the holders of the Consolidated Bonds was paid according to their contract it made no difference to them in what manner or from what source the money was derived, but when the payment was discontinued, though they may not be in a position to object to the repeal of laws which formed no part of their contract, or to insist upon the collection of a tax in a manner not comtemplated by that contract, there is no good reason why they should not be allowed to enforce the contract and the laws which form part of it.

In the case of Van Hoffman vs. the City of Quincy, already referred to, the Supreme Court said, concerning legislation enacted subsequent to that in existence when the Bonds were issued :

" The laws requiring taxes to the requisite amount to be collected, in force when the Bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these Bonds, a nullity. It is the duty of the City to impose and collect the taxes in all respects, as if that act had not been passed. A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion."

The same thing may be said of the legislation which, it is claimed, affects the Relators' Bonds and

their rights under the Act of 1852. The very argument that there has been an acquiescence since 1856 in the method then provided for the payment of the Consolidated Debt is as strong for the Relators as for the Respondents, since it is an admission that since 1856 the Relators have been the holders of valid, subsisting obligations, which, after the lapse of twenty-five years, it is claimed are unconstitutional.

If this view be correct, then the Relators are entitled to the enforcement of the provisions of the Act of 1852 as part of their contract.

It is clear that the writ of *mandamus* is the only method by which such enforcement can be attained, and has frequently been recognized as the appropriate remedy in such cases.

Dillon on Municipal Corporations, p. 685, says:

"*Mandamus* is one of the principal remedies by which municipal and public corporations are compelled to perform their duties towards their creditors. The power of the Legislature over these corporations is such that it may require them to levy a tax to pay creditors, and obedience to such requirement may be enforced by *mandamus*."

Cooley on Taxation, p. 524, says:

"One of the most common cases in which the writ of *mandamus* is employed in tax matters, is where it has become the clear duty of the authorities to levy a tax for general purposes or for the payment of some demand, and they refuse to do so."

Burroughs on Taxation, p. 151, says:

"Where there is no plain and adequate remedy for the creditor, the Courts of common law will issue a *mandamus* to the officers of the corporation, who are invested with the power of levying taxes, directing them to levy a sufficient tax to pay the debt of the creditor."

In his treatise on Municipal Bonds, p. 56, Mr. Dillon says:

"The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes is by *mandamus*, which is an adequate remedy."

The Relators in this case have no other adequate remedy. Unless the corporation respondent can be compelled to collect the interest due on these Bonds by taxation, it does not appear that there is any other way by which the funds can possibly be raised. Any law, therefore, the effect of which would be to deprive Relators of this right, which existed when their Bonds were issued and formed part of the contract created by the Act of 1852, impairs the obligation of that contract, and to that extent is absolutely null and void. This case does not present a question of the power of the Legislature to change the remedy. If Acts Nos. 5 of 1870 and 31 of 1876, so far as they affect the taxing power of the City Council and the authority of the Courts to compel the levy of a tax by *mandamus*, apply to the case at bar, and are constitutional, the Relators have no remedy at all, and their Bonds are merely the representatives of an abstract right, which they have no

means of enforcing. It may well be doubted whether the Act No. 5 of 1870 was intended to apply to cases such as this; but whether it was or not, for the reasons already given, that Act and Act No. 31 of 1876, in so far as they affect the rights acquired by Relators under the Act of 1852, are null.

Relators have prayed for an injunction restraining Defendants from imposing any other tax than that claimed by them to the prejudice of their claims.

The Court is, however, very clearly of opinion that a proper case for the issuance of an injunction has not been presented. If the tax claimed by Relators is levied and collected, they have no interest in preventing the collection of other taxes.

For these reasons, it is ordered, adjudged and decreed that the alternative writ of *mandamus* herein issued be made peremptory, as prayed for, and that the application of the Relators for the writ of injunction be refused. It is further ordered that the interventions of H. W. Montgomery and others, and of the State of Louisiana, in so far as they join the Relators in the prayer for the writ of *mandamus*, be sustained; otherwise that the prayer of said intervenors be refused. It is further ordered that the intervention of John J. Weckerling and others be stricken out, and that the intervention of Thomas H. Hunt be dismissed as in case of non-suit, at the cost of intervenors. It is further ordered that Respondents pay all other costs of this proceeding.